

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On June 25, 2013 appellant, then a 44-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on June 21, 2013 he ruptured his right quadriceps tendon after he slipped and fell while descending stairs while in the performance of duty. He stopped work on June 21, 2013. OWCP accepted the claim, assigned OWCP File No. xxxxxx192, for a rupture of the right quadriceps tendon. On July 16, 2013 Dr. Mathew W. Pombo, a Board-certified orthopedic surgeon, performed a repair of the right quadriceps tendon rupture. OWCP paid appellant wage-loss compensation for total disability from work beginning August 25, 2013.

On June 28, 2014 OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion examination.

In an August 26, 2014 report, Dr. Doman found full flexion and extension of the right knee with no instability, and normal muscle and quadriceps strength. He determined that appellant had no objective findings of his accepted work injury and could return to his regular employment.

On November 19, 2014 Dr. Pombo found full right knee motion without swelling, a negative ligamentous examination, a negative McMurray's test, full strength, and mild patella tenderness. He diagnosed bilateral knee pain and a right quadriceps tendon rupture. Dr. Pombo reviewed the results of an October 6, 2014 functional capacity evaluation (FCE) finding that appellant could perform heavy work.³ He noted that appellant had a separate claim for problems with his left lower back, hip, and knee. In a return to work note dated November 19, 2014, Dr. Pombo determined that he could return to work without restrictions.

By decision dated May 18, 2015, OWCP terminated appellant's wage-loss compensation benefits effective May 19, 2015 as the weight of the evidence, as represented by Dr. Pombo and Dr. Doman, established that he had no further employment-related disability.

On May 28, 2015 appellant requested reconsideration.

By decision dated June 5, 2015, OWCP denied modification of its May 18, 2015 termination decision.

² Docket No. 15-1776 (issued December 10, 2015); *Order Remanding Case*, Docket No. 17-1094 (issued February 5, 2018).

³ A July 30, 2014 FCE, received by OWCP on June 16, 2015, indicated that appellant could perform all the duties of his position with the exception of restraining inmates. An October 6, 2014 FCE determined that he could resume his full employment without restrictions. It indicated that appellant demonstrated the ability to perform heavy work.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated July 15, 2015 revealed a moderately large disc herniation at L4-5 and migrated disc fragment behind L4 on the right causing compression of the thecal sac and bilateral exiting nerve roots.

On August 4, 2015 appellant requested reconsideration. He submitted June 12 and July 10, 2015 reports from Dr. Jay B. Bender, a Board-certified physiatrist, in support of his request.

By decision dated August 14, 2015, OWCP denied appellant's request for reconsideration after finding that he did not submit evidence or raise an argument sufficient to warrant reopening his case for further review of the merits under 5 U.S.C. § 8128(a).

On August 24, 2015 appellant appealed to the Board. By decision dated December 10, 2015, the Board affirmed the May 18 and June 5, 2015 decisions terminating appellant's wage-loss compensation effective May 19, 2015 as he had no further employment-related disability.⁴ The Board set aside the August 14, 2015 decision, however, finding that the June 12 and July 10, 2015 reports from Dr. Bender constituted new and relevant medical evidence and that, consequently, OWCP had improperly denied his request to reopen the case for further merit review under 5 U.S.C. § 8128(a). The Board remanded the case for OWCP to conduct a merit review of the claim.⁵

By decision dated March 3, 2016, OWCP denied modification of its June 5, 2015 decision.

On April 20, 2016 Dr. Bender diagnosed a right quadriceps tendon tear and advised that appellant was "incapacitated and retired at this point." He recommended continued physical therapy.

On June 6, 2016 Dr. Bender related:

"[Appellant's] physical activities of dealing with inmates, walking on concrete floors, running up and down stairs began the symptoms of his low back pain in 2011, but [were] aggravated by his fall in 2013 and up until 2015 when the MRI [scan] was done which showed a herniated disc which is related to his bending, stooping, pushing, running, and restraining inmates, and it was related directly to the 2011 work injury. His herniated nucleus from [the] 2011 work-related injury was not diagnosed until 2015, and that was directly related again to his 2011 injury."

By decision dated October 13, 2016, OWCP denied modification of its March 3, 2016 decision. It noted that appellant had filed a 2014 claim for an injury to his left leg and hip due to arising from overcompensating for his right leg condition. OWCP indicated that it had assigned OWCP File No. xxxxxx878 and denied the claim. It further noted that appellant had filed an occupational disease claim alleging that he had become aware on March 15, 2011 that performing

⁴ *Supra* note 2.

⁵ By decision dated January 27, 2016, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right lower extremity.

his work duties, including walking on concrete floors and climbing stairs, had caused or aggravated his low back condition. OWCP assigned OWCP File No. xxxxxx105 and denied the claim.

On October 26, 2016 Dr. Bender described appellant's work duties and his June 21, 2013 slip and fall on stairs. He noted that after his surgery to repair the right quadriceps tendon he had experienced pain in his left hip and numbness radiating into the left lower extremity. Dr. Bender related that he altered his posture because he could not bear full weight on the right side, which resulted in a limp and strain on his low back. He asserted that appellant had a consequential injury to his left lower extremity and lumbar spine due to his June 21, 2013 employment injury and opined that he was totally disabled.⁶

In a request for expansion of the acceptance of the claim of even date, Dr. Bender advised that OWCP should accept lumbar intervertebral disc displacement with myelopathy, lumbar facet arthropathy, lumbar degenerative disc disease, and bilateral patellar tendinitis.

By decision dated January 23, 2017, OWCP denied modification of its October 13, 2016 decision. It further found that the evidence of record was insufficient to establish that appellant had sustained a consequential injury causing disability.

On January 27, 2017 appellant requested that OWCP expand acceptance of his claim to include the additional diagnoses as recommended by Dr. Bender on October 26, 2016.

On April 20, 2017 appellant appealed to the Board. By order dated February 5, 2018, the Board set aside the January 23, 2017 decision.⁷ The Board remanded the case for OWCP to administratively combine OWCP File Nos. xxxxxx878, xxxxxx105 and xxxxxx192, followed by an appropriate merit decision on the claim.

By decision dated March 26, 2018, OWCP denied modification of its October 13, 2016 decision.

In a report dated April 19, 2018, Dr. John W. Ross, an internist, obtained a history of appellant rupturing his right quadriceps on June 21, 2013 falling down stairs. He diagnosed a right quadriceps tendon rupture and repair. Dr. Ross advised that he had lumbar disc disease and related, "The lower back and both knees are set up like a tripod. Since the lower back is compensating for the right knee this will result in lumbar disc disease. This prognosis will eventually get worse over time. [Appellant] is experiencing left hip pain because of compensation for [the] right knee." Dr. Ross noted that he was not working and recommended continued physical therapy.

On March 11, 2019 appellant requested reconsideration.

By decision dated April 15, 2019, OWCP denied modification of its March 26, 2018 decision.

⁶ Dr. Bender submitted similar reports dated November 9 and December 20, 2016.

⁷ *Supra* note 2.

On June 5, 2019 OWCP expanded the acceptance of appellant's claim to include other internal derangements of the right knee, an unspecified sprain of the right hip, a sacroiliac joint sprain, lumbar and lumbosacral intervertebral disc disorders with radiculopathy, and a rupture of the right quadriceps muscle.

On July 8, 2019 appellant requested reconsideration.⁸ He noted that OWCP expanded his diagnoses to include the lower back, left hip, and left leg injuries. Appellant asserted that OWCP should not have determined that he could work given his injuries. He requested wage-loss compensation for total disability.

In a report dated July 11, 2019, Dr. Robert L. Bowers, an osteopath, evaluated appellant for pain in his posterior hip and buttock beginning in 2013. He diagnosed buttock pain, left hip pain, left lumbar radiculopathy, and a spasm of the left piriformis muscle.

By decision dated September 13, 2019, OWCP denied modification of its April 15, 2019 decision.

An FCE performed on February 12, 2020 indicated that appellant could perform work at a medium level.

On March 12, 2020 appellant asserted that Dr. Bender had found in 2015 that he was unable to work in his usual employment. He noted that a 2020 FCE confirmed that he could only work at a medium level. Appellant submitted an August 21, 2015 report from Dr. Bender finding that he was totally and permanently disabled.

In a report dated March 13, 2020, Dr. Pombo diagnosed status post right quadriceps tendon repair and advised that he could work at a medium capacity.

On March 17, 2020 appellant requested reconsideration.

In a work capacity evaluation (OWCP-5c) dated March 24, 2020, Dr. Pombo indicated that appellant could perform medium employment in accordance with the FCE.

On May 5, 2020 appellant requested reconsideration. He maintained that he had been disabled as of May 19, 2015 due to his accepted employment injury.

On May 27, 2020 Dr. Miguel E. Stubbs, an internist, obtained a history of the June 21, 2013 employment injury and noted that appellant had retired in 2015. He indicated that after recovery appellant had overcompensated for his right lower extremity injury causing "a significant shift in his posture and gait causing him to limp when he ambulated. This new biomechanical posture put a significant strain on his low back. In addition, appellant's left hip and buttocks started to develop pain and numbness as well." Dr. Stubbs provided a list of the accepted diagnosed conditions and opined that he had sustained a consequential injury to his lumbar spine and left lower extremity. He related, "It is my professional opinion that on June 21, 2013,

⁸ In a June 27, 2019 report, Dr. Anna M. McCrate, a Board-certified physiatrist, provided a history of the June 13, 2013 employment injury. She diagnosed a lumbar disc herniation, left lumbar radiculitis, chronic low back pain, and a rupture of the right quadriceps tendon.

[appellant] sustained a traumatic injury to his right lower extremity and subsequently his low back and left knee, which has caused him to not be able to perform his necessary duties....”⁹

By decision dated June 15, 2020, OWCP denied modification of its September 13, 2019 decision. It found that the evidence of record was insufficient to establish that appellant had continuing disability due to his June 21, 2013 employment injury. OWCP determined that the November 19, 2014 report from Dr. Pombo and the August 29, 2014 report of Dr. Doman remained the weight of the evidence.

LEGAL PRECEDENT

Once OWCP properly terminates a claimant’s compensation benefits, he or she has the burden of proof to establish continuing disability after that date related to the accepted injury.¹⁰ To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP initially accepted that appellant sustained a right quadriceps tendon ruptures due to the accepted June 21, 2013 employment injury. It terminated his wage-loss compensation benefits effective May 19, 2015, finding that he had no further disability due to his accepted right tendon rupture. OWCP based its termination on the opinion of Dr. Doman, an OWCP referral physician, who determined that appellant had no objective findings of the right quadriceps tendon rupture and his attending physician, Dr. Pombo, who opined that he could resume work without restrictions. The Board affirmed OWCP’s termination of appellant’s wage-loss compensation for the accepted condition of a right quadriceps tendon rupture.

As the Board previously affirmed the termination of appellant’s wage-loss compensation, absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, the issue is *res judicata*.¹² The only issue before the Board is whether he has established continuing disability on or after May 19, 2015 causally related to the accepted June 21, 2013 employment injury.

In an October 26, 2016 report, Dr. Bender opined that appellant was disabled from employment. He found that he had sustained a consequential injury to his left lower extremity and lumbar spine as a result of the June 21, 2013 employment injury.

⁹ Dr. Stubbs provided a similar report on June 4, 2020.

¹⁰ *L.S.*, Docket No. 20-0570 (issued December 15, 2020); *V.G.*, Docket No. 17-0583 (issued July 23, 2018).

¹¹ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *C.L.*, Docket No. 18-1379 (issued February 3, 2019).

¹² *R.T.*, Docket No. 20-0575 (issued September 30, 2020); *E.H.*, Docket No. 19-1352 (issued December 18, 2019).

In a report dated May 27, 2020, Dr. Stubbs reviewed the history of the June 21, 2013 employment injury. He opined that appellant's altered gait subsequent to his injury had strained his lower back and left lower extremity resulting in his inability to perform the duties of his employment. Dr. Stubbs further opined that appellant had sustained a traumatic injury to his right lower extremity and subsequently his low back and left knee, which has caused him to not be able to perform his necessary duties.

Appellant requested that OWCP expand acceptance of his claim to include a consequential injury to his left lower extremity and lumbar spine. OWCP, on June 5, 2019, expanded acceptance of his claim to include other internal derangements of the right knee, an unspecified sprain of the right hip, a sacroiliac joint sprain, lumbar and lumbosacral intervertebral disc disorders with radiculopathy and a rupture of the right quadriceps muscle. By decision dated June 15, 2020, however, it denied appellant's request for continuing compensation for employment-related disability, finding that the opinions of Dr. Doman and Dr. Pombo continued to constitute the weight of the evidence. Dr. Doman and Dr. Pombo, however, failed to address whether he had disability due to the expanded conditions of other internal derangements of the right knee, an unspecified sprain of the right hip, a sacroiliac joint sprain, and lumbar and lumbosacral intervertebral disc disorders with radiculopathy.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹³ Once it undertook development of the evidence by referring appellant's case for a second opinion evaluation, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.¹⁴ OWCP expanded acceptance of appellant's claim subsequent to its termination of compensation to include additional conditions. It failed to request a supplemental opinion from Dr. Doman; however, regarding whether the expanded conditions resulted in continuing disability from employment or the need for medical treatment.¹⁵

On remand, OWCP shall refer appellant, together with an updated statement of accepted facts, which includes the expanded conditions along with the case record, to Dr. Doman for a supplemental opinion. After this and other such development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹³ *R.T., id.; A.A.*, 59 ECAB 726 (2008).

¹⁴ See *R.L.*, Docket No. 20-1069 (issued April 7, 2021); *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

¹⁵ See *C.S.*, Docket No. 20-0621 (issued December 22, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 27, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board